SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 8 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1970

No. [redacted]
228

GENE ROBERT TURNER, - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

THEODORE WURMSER,
GARY L. GARDNER,
EUBANKS, GARDNER & SCHAEFER,
Suite 999, Portland Federal Bldg.,
200 West Broadway,
Louisville, Kentucky 40202,
Attorneys for Petitioner.

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

INDEX

PAGE

Opinion Below 2

Jurisdiction 2

Questions Presented for Review 2- 3

Constitutional Provisions Involved 3

Statement of the Case 4- 6

Point I—This Court's decision in *Chimel* v. *California*, 395 U. S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 1034, clarifying the Fourth Amendment limitations on search and seizure should be applied retroactively to those cases subject to direct review on the date of the Court's pronouncement. This presents a substantial constitutional question not heretofore determined by this Court 6- 8

Point II—A search of premises surrounding a defendant and seizure of evidentiary items antecedent to an unexplained delay in the execution of an arrest warrant accompanied by a failure to apply for or obtain a search warrant is violative of the Fourth Amendment requirements and the contrary opinions of the Court below is in conflict with the previous applicable decisions of this Court 8- 9

Point III—The introduction of evidence of subsequent similar criminal acts and the denial by the trial court of defendant's request for a continuance in the proceedings to invoke compulsory process to obtain witnesses on his behalf to rebut surprise testimony concerning subsequent criminal acts conflicts with the Sixth Amendment as previously construed in applicable decisions of this Court... 9-10

Conclusion 11

Appendix A—Opinion of the United States Court of Appeals for the Sixth Circuit 13-19

TABLE OF CASES CITED.

	PAGE
Arsenault v. Massachusetts, 393 U. S. 5	7
Chimel v. California, 395 U. S. 752	1, 2, 6, 9
Desist v. United States, 394 U. S. 244	7, 8
England v. Louisiana State Board of Medical Examiners, 375 U. S. 411	6
Fahy v. Connecticut, 375 U. S. 85	8
Fairbanks v. United States, 226 F. 2d 251	10
Hall v. United States, 150 U. S. 76	10
Halliday v. United States, 394 U. S. 831	7
Harris v. United States, 331 U. S. 145	9
Michelson v. United States, 335 U. S. 469	10
Shipley v. California, 395 U. S. 818	6
Tehan v. United States, 382 U. S. 406	7, 8
Terry v. Ohio, 392 U. S. 1	8, 9
United States v. Jeffers, 342 U. S. 48	9
Von Cleef v. New Jersey, 395 U. S. 814	6
Washington v. Texas, 388 U. S. 14	10

STATUTES CITED.

	PAGE
18 U.S.C. Sections 2312 and 2313	4
28 U.S.C. Section 1254(1)	2
Federal Rules of Criminal Procedure 14(e)	5
U. S. Constitution:	
Fourth Amendment	2–3
Sixth Amendment	3

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1970

No. _____

GENE ROBERT TURNER, - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Chief Justice and the associate Justices of the Supreme Court of the United States:

Your Petitioner, Gene Robert Turner, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit refusing to suppress evidence seized from defendant's home at the time of his arrest which was effected pursuant to an arrest warrant and without the issuance of a search warrant in holding that this Court's dictates as set forth in *Chimel* v. *California,* 395 U. S. 752, are not to be applied retroactively. Petitioner further prays that this Court determine the constitutionality of the lower Court's decision sustaining a denial of petitioner's request for a continuance of the

trial proceedings to invoke compulsory process to obtain witnesses to testify in his behalf relative to criminal acts occurring subsequent to those for which he was on trial and the facts of which had been recited before the jury.

OPINION BELOW.

The opinion of the Court below is appended hereto as Appendix A, and is to date not officially reported.

JURISDICTION.

The order and final judgment sought to be reviewed was decided and filed May 7, 1970. The statutory provision believed to confer on this Court jurisdiction to review the final order and judgment in question is 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the search and seizure limitations contained in the Fourth Amendment to the United States Constitution as announced by this Court in *Chimel* v. *California, supra,* are to be applied retroactively to those cases subject to direct review on the date of this Court's rendition of those pronouncements?

2. Whether the failure of federal agents to obtain a search warrant to search defendant's home and seize evidence coupled with the possession by the agents of an arrest warrant for forty-five days before his arrest without any showing of justification for the delay in

executing the arrest warrant is inconsistent with the requirements of the Fourth Amendment to the United States Constitution?

3. Whether the trial court may allow the introduction of evidence of subsequent similar criminal acts by defendant, and then may, consistent with the Sixth Amendment, deny an accused on trial a continuance in the trial proceedings to invoke compulsory process to obtain witnesses to testify in his behalf to rebut this surprise testimony?

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment IV, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Amendment VI, United States Constitution:

> ". . . to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, . . ."

STATEMENT OF THE CASE.

On January 20-23, 1969, Petitioner was tried and convicted by a federal district jury on three counts of violating the Dyer Act, 18 U.S.C. Sections 2312 and 2313, and sentenced to serve five years on each of the three counts, the sentences to run concurrently.

On July 8, 1968, F.B.I. agents obtained a warrant in Clarksville, Tennessee, charging petitioner with the above violations. The warrant was immediately transferred to Louisville, Kentucky, for execution. On the morning of August 21, 1968, forty-five days later, F.B.I. agents appeared at the home of petitioner and executed the warrant and while petitioner was in custody rummaged at will among desk and bureau drawers, closets and other concealed areas, selecting at will evidentiary items that might connect petitioner with the violations charged in the warrants, all over the objections of petitioner. No search warrant was ever obtained and no application was made for issuance of a warrant to search the home of petitioner.

At the petitioner's trial, he was identified by three eye witnesses who had been present at certain stages of the violations, as having been dressed in army fatigues and two of the witnesses testified that they had received numerous long distance phone calls to their respective business phones. However, two or those who were also present at the same stages of the violative acts could not identify petitioner.

Two alibi witnesses comprised the defense of petitioner and testified to petitioner's presence in an ad-

joining State over two hundred miles away at the time the eye witnesses' identifications were supposed to have occurred.

During the trial, the United States introduced many of the evidentiary items seized from petitioner's home at the time of his arrest, which included: army fatigues, phone bills, bearing the numbers of the business phones previously having been identified by the two witnesses for the United States, and a typewriter rental slip.

At pre-trial proceeding held on January 10, 1969, petitioner filed a motion to suppress all evidence seized during the search of petitioner's home pursuant to Federal Rules of Criminal Procedure 41(e) alleging the illegality and unconstitutionality of the seizure. Following an evidentiary hearing, this motion was overruled on January 17, 1969, by the trial court.

The last witness called before the jury by the United States was one Barbara S. Cofer, Deputy Clerk of the Hardin County Clerk's office, Elizabethtown, Kentucky, who testified to criminal acts occurring some four (4) months subsequent to the date of the last criminal act forming the basis of the present proceedings, and consisted of false swearing to two (2) automobile registration certificates. After strenuous objections by defendant's counsel which were unavailing, motion was made that the trial be continued to allow defendant to subpoena witnesses in his behalf and secure all witnesses concerned with the latter criminal acts. This motion being overruled, defendant requested

a mistrial be declared and the jury be discharged, which was also denied.

In its decision, attached hereto as Appendix A, the United States Court of Appeals for the Sixth Circuit concluded that under *Chimel* v. *California, supra,* the search in the instant case would be impermissible, however, they refused to apply *Chimel* retroactively.

POINT I.

This Court's decision in *Chimel* v. *California,* 395 U. S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034, clarifying the Fourth Amendment limitations on search and seizure should be applied retroactivley to those cases subject to direct review on the date of the Court's pronouncement. This presents a substantial constitutional question not heretofore determined by this Court.

Following this Court's determination of the basic constitutional issues in *Chimel* v. *California, supra,* the issue of retroactive application was left unanswered to date. *Von Cleef* v. *New Jersey,* 395 U. S. 814; *Shipley* v. *California,* 395 U. S. 818. Thereafter, the Court further avoided the issue of retroactive application by denying certiorari in six cases pending on the date *Chimel* was decided. See dissent of Justice Whit., *Shipley* v. *California,* 395 U. S. 818, at 735.

The granting of retroactive application of this Court's decisions and the extent thereof has been categorically resolved by (a) complete denial, *England* v. *Louisiana State Board of Medical Examiners* (1964), 375 U. S. 411; (b) limiting the application only to the case in which the rule was announced,

Halliday v. *United States* (1969), 394 U. S. 931; *Desist* v. *United States* (1969), 394 U. S. 244; (c) granting retroactivity to those cases still subject to direct review, *Tehan* v. *United States* (1966), 382 U. S. 406; (d) full extension of the retroactive effect even to those cases which had been finally adjudicated, *Arsenault* v. *Massachusetts* (1968), 393 U. S. 5.

The reasoning employed by Justice Harlan in his dissent in *Desist* v. *United States, supra,* at 260, appears to aptly summarize the lack of uniform treatment of criminal defendants by the continuance of a lack of consistent approach to retroactivity. To disregard this sound analogy would allow the same arguments to be expounded on the same day in different courtrooms with the final outcome dependent upon who acquires this Court's favor first through the judicial process. The foundation of the legal educational process and the incentive of counsel to advance and maintain stablity in the judicial framework require adherence to reasoning and logic and the administration of justice with an even hand. See Justice Douglas' dissent, *Desist* v. *United States, supra,* at 258.

The criteria for determining the retroactivity of the Court's new rules as set forth in *Desist, supra,* at 255: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards," are not intact in the present case. There can be no reliance where "the government has offended constitutional principle in

the conduct of his case" (Justice Harlan dissent, *Desist, supra,* at 261), and bypassed the Fourth Amendment warrant requirements by subterfuge. *Terry* v. *Ohio,* 392 U. S. 1, and 905. This, too, involves reliance by defense counsel upon the existent constitutional standards. Being within the framework of the federal system "relatively few" cases would have to be reconsidered. *Tehan* v. *United States, supra,* at 461. (See Justice Harlan dissent, *Desist* v. *United States, supra,* at 260.)

POINT II.

A search of premises surrounding a defendant and seizure of evidentiary items antecedent to an unexplained delay in the execution of an arrest warrant accompanied by a failure to apply for or obtain a search warrant is violative of the Fourth Amendment requirements and the contrary opinion of the Court below is in conflict with previous applicable decisions of this Court.

The admission at trial of illegally seized evidence must be prejudicial as a matter of law as it can only be used by its very nature as circumstancial or corroborative evidence to buttress the testimony of prosecution witnesses. *Fahy* v. *Connecticut,* 375 U. S. 85. The present circumstances are not unlike those in *Fahy, supra,* except to the extent *a fortiori* is presented herein as the alibi witnesses' testimony was in direct conflict with the eyewitness identification of petitioner, *Id.,* at page 174. and the corroborative effect swung the pendulum of guilt against petitioner.

The requirements of the Fourth Amendment cannot be dispensed with at the whims of the investigating officers and those seeking an exemption from those requirements must assume the burden of justifying their by-pass of the magistrate. *United States* v. *Jeffers,* 342 U. S. 48; *Terry* v. *Ohio,* 392 U. S. 1. As found by the lower court no reason appears in the transcript for the forty-five day delay in execution of the arrest warrant, and no search warrant was ever obtained. This Court has on many occasions condemned the expedient police tactic of arranging to arrest a defendant on premises desired to be searched and which cannot be accomplished by means of a search warrant as the officers cannot identify the items to be seized. *Harris* v. *United States,* 331 U. S. 145; *Chimel* v. *California, supra,* at 696. This, we submit, raises an important constitutional issue resolved below in a manner not in conformity with the applicable decisions cited above.

POINT III.

The introduction of evidence of subsequent similar criminal acts and the denial by the trial court of defendant's request for a continuance in the proceedings to invoke compulsory process to obtain witnesses in his behalf to rebut the surprise testimony conflicts with the Sixth Amendment as previously construed in applicable decisions of this Court.

The facts comprising this important and fundamental constitutional question have not heretofore been before this Court for determination.

The prejudicial effect of the introduction of evidence of other or similar criminal acts by an accused

has historically been recognized and condemned by this Court. *Hall* v. *United States,* 150 U. S. 76. We are not unmindful, however, that many courts have attempted to develop many exceptions to this Court's rule on the subject. *Fairbanks* v. *United States,* 226 F. 2d 251. The overriding policies excluding such evidence, however, have far outweighed any probative value such testimony might contain and those policies bring the instant case squarely under this Court's protective mandates. *Michelson* v. *United States,* 335 U. S. 469, at 475-476.

The readily apparent practical difficulties of the "confusion of issues, unfair surprise and undue prejudice," *Id.,* 335 U. S. at p. 476, are compounded when the defendant attempts to clarify the issues and rebut the prejudicial effect of such testimony by invoking his Sixth Amendment guaranty of compulsory process. To disallow the defendant a continuance of the trial proceedings under such circumstances nullifies the underlying fundamental elements contained in the Sixth Amendment. *Washington* v. *Texas,* 388 U. S. 14, at 18. We believe that this Court should consider this substantial and fundamental Federal constitutional question which has not heretofore been determined by this Court.

CONCLUSION.

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

THEODORE WURMSER,
GARY L. GARDNER,
EUBANKS, GARDNER & SCHAEFER,
Suite 999, Portland Federal Bldg.,
200 West Broadway,
Louisville, Kentucky 40202,

Attorneys for Petitioner.

APPENDIX

APPENDIX A

No. 19669

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GENE ROBERT TURNER, - - - - - - *Appellant,*

v.

UNITED STATES OF AMERICA, - - - - - *Appellee.*

Appeal from the United States District Court for the Middle District of Tennessee.

OPINION—Decided and Filed May 7, 1970.

Before PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

PHILLIPS, Chief Judge. Gene Robert Turner was convicted by a jury on three counts of violating the Dyer Act, 18 U.S.C. §§ 2312 and 2313, and sentenced to serve five years on each of the three counts, the sentences to run concurrently. Turner appeals.

On April 23 and 24, 1968, a total of three calls were charged to Turner's telephone in Louisville, Kentucky. The number called in each instance was that of Roberts Ivey and Vance Funeral Home in Clarksville, Tennessee. Mr. Hooker, one of the operators of the funeral home, testified

that he monitored at least two calls[1] on those dates purporting to be from an Anthony Wallace, who identified himself as a soldier stationed at Fort Campbell, Kentucky, a short distance from Clarksville. Wallace said that he was being transferred to Vietnam and was interested in having the funeral home store his 1966 Cadillac until he returned. He made arrangements to visit the funeral home to discuss the matter further.

On April 26, 1969, a man identifying himself as Anthony Wallace and a second man who identified himself at Wallace's cousin, but who was identified subsequently by Mr. Hooker and another employee as Gene Robert Turner, arrived at the funeral home in the 1966 Cadillac. This Cadillac was identified by the F.B.I. as one stolen in Louisville, Kentucky, on April 24, 1968.

Both men were dressed in army style fatigue uniforms with insignia on them similar to the type worn by the soldiers at nearby Fort Campbell. After Wallace and his "cousin" had discussed the problems about leaving the car with family or friends, Wallace offered to sell it to Mr. Roberts. Mr. Roberts decided that he did not want to purchase it at the price offered. Mr. Hooker was then offered an opportunity to buy the car. After an agreement had been reached between Wallace and Mr. Hooker regarding the car, it was decided that the transaction would be completed the next day as it was late in the afternoon and the bank was closed. The next day (April 26, 1968) Wallace returned alone to the funeral home to deliver the car. Mr. Hooker paid Wallace two thousand dollars for the automobile and Wallace executed a notarized bill of sale to Mr. Hooker for the stolen automobile.

---

[1]Mr. Hooker testified that the telephone calls were to Mr. Roberts but that due to the fact that Mr. Roberts was hard of hearing, Mr. Hooker made it a practice to moniter calls to Mr. Roberts for the purpose of avoiding mistakes. The age of Mr. Roberts at that time was 79.

On May 10, 1968, I. L. Gammons, Manager of Dixie Auto Parts and Sales in Clarksville, Tennessee, received a telephone call from a man identifying himself as Joseph Callan, a soldier stationed at Fort Campbell, who said he was interested in selling his 1965 Cadillac prior to being transferred to Vietnam. Subsequently a man identifying himself as Joseph Callan and a second man later identified as Gene Robert Turner arrived at the office of Dixie Auto Parts and Sales in a 1965 Cadillac subsequently found by the F.B.I. to have been stolen in Indianapolis, Indiana, on May 6 or 7, 1968. Both men were wearing army type fatigue uniforms and represented themselves to be soldiers stationed at Fort Campbell.

An agreement had been made for Mr. Gammons to purchase the automobile when it was discovered that "Joseph" on the Kentucky registration papers had incorrectly been spelled "Josep." Mr. Gammons with Callan and Turner proceeded to Hopkinsville, Kentucky, to have the registration changed. Upon their return to Clarksville, the payment was made and Mr. Gammons assisted the men in cashing the check. Turner was identified as the defendant-appellant in this case by Mr. Gammons and another employee of Dixie Auto Parts and Sales.

The F.B.I. investigation revealed that both Cadillacs had been stolen and moved in interstate commerce prior to being sold in Clarksville. The investigation resulted in an arrest warrant being issued on July 8, 1968, charging Gene Robert Turner with a violation of the Dyer Act on three counts. The arrest warrant was executed on August 21, 1968, when F.B.I. agents appeared at Turner's Louisville home. No reason appears in the transcript for the delay between the issuance of the arrest warrant in Tennessee and its execution in Kentucky. Turner's retained counsel did not attack the delay as unreasonable either at trial or on this appeal. Under these circumstances and absent any showing of prejudice to Turner's rights, we hold that the

delay was not so unreasonable as to require reversal as a matter of law.

Turner was informed of the nature of the charges against him and placed in custody. Over the objection of Turner, the room in which he was arrested was searched and a number of items seized. The significant items which were later admitted into evidence over Turner's objection were: (1) army type fatigue uniforms of the type worn by Turner and his companion on the visits to Mr. Hooker and Mr. Gammons in Clarksville; (2) telephone invoices listing certain long distance calls charged to Turner's telephone and showing that the charges were for calls from Turner's telephone to the number listed for the Roberts, Ivey and Vance Funeral Home in Clarksville on April 23 and 24, 1968; and (3) a rental receipt for a typewriter rented by or for Turner and latter reported by Turner has having been stolen.

Evidence was adduced that Turner on two occasions had identified himself as the brother of Anthony Wallace in order to register Cadillac automobiles in the name of Wallace in Hardin County, Kentucky. The witness, the deputy court clerk of that county, testified that she became suspicious when Turner told her that he had never been in her office before. When she checked the records she discovered that four Cadillacs prior to that time had been registered in the name of Anthony Wallace. The deputy clerk stated that she had rembered Turner from a visit to her office two weeks earlier when she had assisted him in registering a Cadillac. Both of these visits were subsequent to the events charged in this case. On cross examination this witness testified that State charges were pending at that time against Turner for false registration of an automobile.

There was evidence that the papers used to secure the Kentucky registrations which later were used in selling the automobiles in Tennessee were not typed upon typewriters in the office of the county clerk. The testimony was that the registrations were forged.

Turner's defense consisted of an alibi. There was testimony which if believed would have placed Turner in Louisville at times which would have precluded his being in Clarksville on the dates charged. This defense was a question of fact and was resolved against Turner by the jury.

On appeal Turner raises three questions: (1) whether the Court erred in refusing to grant him a bill or particulars; (2) whether the case of *Chimel* v. *California*. 395 U. S. 752, is to be given retroactive application; and (3) whether the District Court erred in permitting the jury to hear testimony of illegal acts of Turner which occurred subsequent to the events charged and in failing to grant him a continuance to refute the charges.

I.

The question of whether a Court should grant a defendant a bill of particulars is addressed to the sound discretion of the District Judge. Turner on this appeal alleges that he was the victim of illegal wiretapping by the United States. His motion for the bill of particulars, however, contained only the bare assertion of a wiretap and did not present averments of sufficient specificity to require the District Judge to grant the request as a matter of right. We find no abuse of discretion in the denial of the request for a bill of particulars. *Will* v. *United States*, 389 U. S. 90; *Cullen* v. *United States*, 408 F. 2d 1178 (8th Cir.).

II.

The search in this case was permissible under the cases of *United States* v. *Rabinowitz*, 339 U. S. 56 and *Harris* v. *United States*, 331 U. S. 145, but would be impermissible under the case of *Chimel* v. *California*, *supra*, 395 U. S. 752. The latter decision limits searches incident to a lawful arrest to the area within the immediate control of the person ar-

rested, and from which he could secure a weapon or destroy evidence. The instant case was tried in January 1969. The *Chimel* decision was announced in June 1969. The question is presented as to whether the *Chimel* case is to be applied retroactively. This question was left unaswered by the Supreme Court. *Von Cleef* v. *New Jersey,* 395 U. S. 814, and *Shipley* v. *California,* 395 U. S. 818. The question has been answered in the negative by the Courts of Appeals for two circuits. *United States* v. *Bennett.* 415 F. 2d 1113 (2d Cir.), *Whiteley* v. *Meacham,* 416 F. 2d 36 (10th Cir.). In *Colosimo* v. *Perini,* 415 F. 2d 904, this Court reserved a decision as to whether *Chimel* is to be given retroactive effect. For the reasons set forth in the opinion of Judge Friendly in *United States* v. *Bennett, supra,* we hold that *Chimel* v. *California, supra,* is not to be applied retroactively. Hence the search involved here was legal as incident to a lawful arrest under *Rabinowitz* and *Harris,* which correctly set forth the law to be applied in this case.

In any event it appears that the conviction should be affirmed under the decisions of *Chapman* v. *Califorina,* 386 U. S. 18, and *Harrington* v. *California,* 395 U. S. 250. Turner was identified positively by the two men to whom the automobiles were sold as well as by employees of the funeral home and Dixie Auto Parts & Sales. There is also other evidence in the record pointing to Turner's involvement in the acts charged. The evidence establishes conclusively that Turner was wearing army style fatigue uniforms on the occasions described above. The uniforms seized in Turner's room were not necessary to establish this fact. Neither were the telephone invoices which were seized in Turner's room necessary to support a conviction. The fact of the making of the long distance calls is well established in the record without reference to the seized invoices. Thus it appears that if the seized evidence had never been introduced there still would be sufficient evidence in the

record to find Turner guilty beyond a reasonable doubt. Under *Chapman* and *Harrington,* the error, if any, was harmless.

III.

Turner contends that the Court erred in admitting evidence concerning his registration of other Cadillac automobiles in Hardin County, Kentucky, subsequent to the events charged in this case, and in refusing to permit a continuance to refute the allegations. The mention of State charges pending against Turner resulted from cross examination by Turner's retained counsel. The evidence of his identifying himself as the brother of Anthony Wallace in registering other Cadillacs is admissible in any event to show the modus operandi, guilty knowledge on the part of Turner and identity. *Jacobson* v. *United States,* 356 F. 2d 685 (8th Cir.); *United States* v. *Welborn,* 322 F. 2d 911 (4th Cir.); *Williams* v. *United States.* 272 F. 2d 40 (8th Cir.); *Labiosa* v. *Government of the Canal Zone,* 198 F. 2d 282 (5th Cir.).

There was no abuse of discretion in refusing to allow Turner a continuance to refute the evidence concerning the false registrations in Hardin County, Kentucky. There is no allegation that he was surprised by this evidence. No witness is identified who could have been produced in rebuttal in event a continuance had been granted. The matter of a continuance is addressed to the sound discretion of the District Judge. Under the facts of this case we find no abuse of discretion. *Neufield* v. *United States,* 118 F. 2d 375 (D.C. Cir.), cert. denied, 315 U. S. 798.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 228

GENE ROBERT TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted on three counts charging him with aiding and abetting another to sell and dispose of a stolen vehicle transported in interstate commerce, in violation of 18 U.S.C. 2, 2312 and 2313. On January 23, 1969, he was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. A).

The evidence which is detailed in the opinion below (Pet. App. 13-17) showed that two stolen Cadillacs had been purchased by Samuel Hooker and I. L. Gammons, both of Clarksville, Tennessee. Both buyers

testified that they had purchased the cars—in April and May 1968 respectively—from two men dressed in Army fatigues. Both positively identified petitioner as one of the two men (Tr. 90, 188). Their testimony concerning the identity of petitioner was corroborated by the employees of the victims (Tr. 118, 221).

Several witnesses testified that these Cadillacs had been registered in the name of "Anthony Wallace" [1] and that the registrations were forged (Tr. 154, 241). An FBI investigation revealed that these two stolen automobiles had moved in interstate commerce prior to these two sales. A warrant was issued on June 8, 1968, for the arrest of petitioner. On August 21, 1968, two FBI agents arrested petitioner at the home of his mother-in-law in Louisville, Kentucky (Tr. 28).[2] Incident to the arrest, the agents searched the room in which he was found and seized two sets of Army fatigues, receipts for a rented typewriter, and telephone bills addressed to petitioner reflecting phone calls made from the Louisville residence to the business phones of t' car buyers in Clarksville (Tr. 30-35). These items were later admitted into evidence after a pre-trial motion to suppress had been denied.

---

[1] At his meeting with Mr. Hooker, petitioner identified himself as "Wallace's cousin" and the other man identified himself as Wallace (Tr. 83).

[2] As the opinion of the court of appeals notes (Pet. App. 15), the transcript reveals no reason for the month and a half delay between the procurement of the arrest warrant and its execution.

1. Petitioner argues that the admission of testimony concerning the forging of car registrations by him subsequent to his arrest was prejudicial error. The testimony, however, was elicited by petitioner's own counsel on cross-examination, and should therefore not be a basis for an assertion of prejudice.[3] See *United States* v. *Burnett*, 418 F. 2d 912 (C.A. 9); *Felton* v. *United States*, 170 F. 2d 153 (C.A.D.C.), certiorari denied, 335 U.S. 831. The evidence was, in any event, admissible to demonstrate the system employed by petitioner when selling stolen automobiles, and as tending to establish his guilty knowledge (see Pet. App. 19). See also *United States* v. *Baker*, 418 F. 2d 851 (C.A. 6); *Tandberg-Hanssen* v. *United States*, 284 F. 2d 331 (C.A. 10).

Before the testimony had been heard by the jury, petitioner's counsel moved for a continuance in order to obtain all persons connected with the charges pending in Hardin County, Kentucky (Tr. 270). Significantly, he did not claim surprise at the evidence or allege that he had no time to prepare a rebuttal. He made no attempt to name the witnesses he sought or what the proposed testimony would reveal. Moreover, the evidence dealt only with a collateral issue

---

[3] The evidence came from Mrs. Barbara Coffer, Deputy Clerk of the Hardin County, Kentucky, Clerk's Office. She stated that petitioner, on September 28 and October 12, 1968 (over a month after his arrest in the instant case), had registered Cadillacs in the name of Anthony Wallace and had identified himself to her as the brother of Wallace (Tr. 272-274). On cross-examination, the witness disclosed that charges against petitioner for false swearing of affidavits in connection with these registrations were pending in Hardin County Court (Tr. 281).

at best. Under the circumstances, the trial court did not abuse its discretion in denying the motion. *Gardiner* v. *United States*, 321 F. 2d 159 (C.A. 5); *Foster* v. *United States*, 296 F. 2d 65 (C.A. 5); cf. *Unger* v. *Sarafite*, 376 U.S. 575.

2. Petitioner further urges that the search incident to the arrest was invalid under *Chimel* v. *California*, 395 U.S. 752 (assuming that case is deemed to have retroactive application), but even if not the Fourth Amendment was violated by the instant search under pre-*Chimel* standards. The latter contention is insubstantial. The search was contemporaneous with the arrest which took place in the house (contrast *Vale* v. *Louisiana*, No. 727, 1969 Term, decided June 22, 1970), was limited to the room in which the arrest was actually made and resulted in the seizure of evidence directly connected to the illegal scheme for which petitioner was arrested. See *Warden* v. *Hayden*, 387 U.S. 294; *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145.

The further contention in this regard—that the delay between issuance of the arrest warrant and petitioner's arrest vitiated the legality of the search since, in that time, no search warrant had been obtained—is equally without merit. Unlike the situation with regard to the execution of search warrants, the Federal Rules of Criminal Procedure provide no time limit for the execution of arrest warrants. Compare Rule 4(c) with Rule 41(d). As this Court has pointed out, "[t]here is no constitutional right to be arrested." *Hoffa* v. *United States*, 385 U.S. 293, 310. Nor has petitioner shown anything to support the

suggestion (see Pet. 9) that the arrest here was delayed until petitioner was present in the home of his mother-in-law so that a search without a warrant incidental to the arrest could be justified.

With respect to the *Chimel* claim, its retroactivity *vel non* is presently pending for decision before this Court in *Williams* v. *United States*, No. 1125, 1969 Term, certiorari granted, 397 U.S. 986—a case in which the claim is made on direct appeal and the holding in which will presumably govern this case—and in *Elkanich* v. *United States*, No. 1142, 1969 Term, certiorari granted, 396 U.S. 1057, where the issue is raised in an action for post-conviction relief. Accordingly, this Court may deem it appropriate to defer action on the instant petition, insofar as this issue is concerned, until *Williams* and *Elkanich* have been decided.[4]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

---

[4] We note that the court below—which held *Chimel* prospective only—further concluded that, in any event, the introduction of the items seized on the search constituted harmless error under the principles of *Chapman* v. *California*, 386 U.S. 18, and *Harrington* v. *California*, 395 U.S. 250, since "if the seized evidence had never been introduced there still would be sufficient evidence in the record to find Turner guilty beyond a reasonable doubt" (Pet. App. 18-19). Our reading of the record, however, leaves us with the view that the harmless error argument presents an extremely close question in the context of this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 389820 836